

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT IGANGA**

CRIMINAL SESSION CASE NO. 31 OF 2011

5

UGANDA.....PROSECUTOR

VERSUS

10

**A1: MUSIMAMI WILSON KIVIRI
A2: TENYWA EDWARD ALIAS LUBALE
A3: MAGOMBA
PATRICK.....ACCUSED**

15

**BEFORE: THE HONOURABLE LADY JUSTICE FLAVIA SENOGA
ANGLIN**

JUDGMENT

20

The three accused persons above named were charged with Kidnapping with intent to murder c/s 242 and 243 (1) (b) of the Penal Code Act.

25

The case of the prosecution was that the three accused persons on 07.08.10 at Wandago village, in Luuka District, kidnapped Muhammed Kakaire (hereinafter referred to as the victim) a primary two pupil of Wandago Primary School, with intent to murder him.

30

Five witnesses were called by the prosecution in a bid to prove its case. The medical examination reports in respect of the accused persons were admitted in evidence under Section 66 of the Trial on Indictments Act, as exhibits P₁A, P₁B and P₁C respectively.

In determining this case, the court bears in mind the principle of law that an accused person is deemed innocent until proven guilty or pleads guilty.

- 5 The burden of proof is upon the prosecution to prove the guilt of the accused person. The standard of proof is beyond reasonable doubt.

An accused person does not have the burden to prove his innocence or absolutely disprove the evidence of the prosecution witnesses. He/She
10 only needs to raise a defence that will create reasonable doubt of his/her guilt in the mind of court.

Even where the accused gives a defence, it is up to the prosecution, save in a few exceptional cases provided for by law, to adduce evidence
15 to show that, regardless of the defence, the offence was committed and it was committed by the accused person(s) - **Woolmington vs. DPP (1935) AC 462** and **Uganda vs. R.O. 973 Lt. Samuel Kasujja and 2 Others Criminal case 08/92.**

20 To prove kidnapping with intent to murder, the prosecution had to prove the following ingredients of the offence beyond reasonable doubt.

- (1) There was taking away of a person.
 - (2) The taking away was accomplished by force or fraud.
 - (3) The taking away was against the victim's will.
 - 25 (4) That the perpetrators of the offence were motivated by an intent to murder the victim.
 - (5) That the accused persons were the perpetrators of the offence. - See Uganda vs. **Kalungi Constance HC Criminal case No. 443/2007** and **Mukombe Moses Bulu vs. Uganda SC. Criminal Appeal 12/95.**
- 30

The ingredients will be dealt with in the order that they have been set out above.

5 Kidnapping or taking away a person:

In determining this ingredient I wish to bear in mind the definition of kidnapping. It has been defined as ***“The taking away or transportation of a person against that persons will, usually to hold that person in false imprisonment, or confinement without legal authority. This may be done for ransom or in furtherance of another crime”*** - Wikipedia-The Free Encyclopedia.

The prosecution relied upon the evidence of PW2, PW3, PW4 the victim and PW5 to try and prove this ingredient.

15

PW2 Isabirye Silver, the grandfather of the victim, testified that the victim had lived at his home for sometime. On 07.08.10 when PW2 returned home at about 7.30pm the victim was nowhere to be seen. He was told that the victim had gone to the home of A1 Musimami Wilson to play. They checked at the home but did not find the victim there. All efforts to trace him that night with the assistance of neighbours and other residents proved futile. Drums were sounded to alert the whole village.

25 PW3 Mpango Gerald is a step brother to A1 and A2 and a nephew to A3. He learnt of the kidnap on the morning of 08.08.10 when he heard the sound of drums and went to PW2’s home to find out what the matter was. It was about 7.30am.

Many people were gathered at PW2's home. PW3 was told that the victim had gone missing when he went to play at A1's home and had not been found despite all search efforts.

5 PW4 Kakaire Muhammed the victim gave unsworn evidence. At the age of 12 years he was a child of tender years. Upon conducting a voire dire, the court found that he did not understand the nature of an oath but was possessed of sufficient intelligence and knew the duty to speak the truth - Section 38 (3) T.I.A.

10

The victim confirmed that at the time of the alleged offence he lived with his grandfather PW2. On a date he could not recall, while on his way home from A1's home at about 8.00pm, he was grabbed by someone, who also held his mouth. He was blindfolded and gagged with a cloth, lifted and taken to a shrine. At the shrine he was unbound and a substance smeared on him. The next morning later in the day he was removed from the shrine by Benefansio and taken back to PW2's home.

15
20 PW5 WPC Naisanga Christine was on duty at Ikumbya police post on 08.08.10, when one Kaleba Grace LC.1 chairperson of Wandago village and PW2 reported the kidnap of PW4 at the police post. Her 3 colleagues went together with two Local Defence personnel to investigate the complaint. She remained at the police post.

25

About 11.00am, the O/C Wagawaga police post brought the victim. The victim was smeared with local herbs over the head and hands and had cuts on his forehead. A strong smell of feaces emanated from him. He appeared terrified and was trembling. He told PW5 that someone had taken him and hidden him somewhere, although he did not say where.

30

The prosecution case hinges on the evidence of PW4 the victim a child of tender years. The law requires that his evidence be corroborated in material particulars . Refer to **Korobia vs. Republic [2007]1 EA 128 (HCK)** and **Maderenya & Another vs. Republic [1976-85]1 EA 270 (CAT)**. That the victim was taken away is corroborated by the fact that he did not go home that night and all efforts to trace him came to no avail. When he was returned to the home of PW2 and taken to police he appeared terrified and was trembling. Court finds that prosecution proved to the required standard that the victim was taken away.

As to whether the kidnapping was by force and against the will of the victim, the 2 ingredients will be handled together. The evidence of the victim was that he was grabbed, blind folded, gagged and whisked away. The next morning he was brought home and he appeared confused and terrified.

Decided cases have established that, in all cases of this nature ***“Where it is alleged that a child has been kidnapped, it is the absence of the consent of that child that is material. This is the case regardless of the age of the child. A child before 14 years is deemed not to have the understanding or intelligence to consent”*** - See **R vs. D [1984] AC 778 at 806 HL.**

At the time of the alleged offence the victim was between 7-9 years and was therefore not capable of giving consent. That he was taken away against his will can be discerned from the circumstances surrounding his disappearance. PW2 did not give his consent which would have been necessary in this case and hence his reasons for mobilizing the village to search and reporting the disappearance to police.

Court finds that the two ingredients were proved to the required standard.

5 Court now proceeds to determine whether the perpetrators of the kidnap were motivated by an intent to murder the victim.

The prosecution believes that by smearing the victim with an unknown substance which they say caused him a headache and stomachache,
10 the perpetrators intended to murder the victim. The substance was referred to by PW5 as local herbs. She also added that the victim had razor blade cuts on his forehead, was trembling and appeared terrified. The victim though never mentioned ever being cut at all.

15 The defence argued that, without medical evidence to show that PW4 had a headache or stomachache, there is nothing to indicate that whatever was on his head was capable of causing death. And that since he had been out playing it could have been ash and not herbs on his face.

20

Court agreed with counsel for the defence that no evidence was adduced to show that whatever substance the victim was smeared with was capable of causing death. The law also provides that, such intent to murder or to put in danger of being murdered can only be **presumed**
25 ***“Where a person so kidnapped or detained is thereafter not seen or heard of within a period of 6 months or more”*** - **Section 43 (2) of the Penal Code Act.**

In the present case, the victim was found the next day when he was
30 taken back to the home of PW2, about mid morning of 08.08.10.

For those reasons, court finds that the prosecution failed to prove to the required standard that the perpetrators of the kidnap had intent to murder the victim or put him in danger of being murdered.

5

The last ingredient is whether the accused persons were the perpetrators of the offence.

10 The prosecution evidence in this respect was that all the accused and the victim reside in the same village, with A1 being the closest neighbour to PW2 where the victim lived. The victim often went to A1's home to play and on the date he disappeared he had gone there to play.

15 All the 3 accused persons were known as witch doctors on the village and they all admitted that that was their calling.

20 The search for the victim went on all night. Drums were sounded and continued to be sounded the next morning. The matter was referred to LC.1 chairperson and to Ikumbya police. Police Officers were sent to the home of PW2. Many people gathered at the home including police from Itaingirirwa police post. Among the people who responded to the drums were the 3 accused persons.

25 At about 1pm, according to PW2, A1's son Benefansio came with the victim to PW2's home. The victim was received by police. But when asked where he had been the victim could not understand. He was then taken to Ikumblya police post. PW5 confirmed receiving him at the police post.

30

Upon his return from police, PW2 found that the villagers had arrested the 3 accused persons. The accused were all assaulted by the crowd.

5 PW3 a step brother to A1 and A2 and a nephew to A3 confirmed that all accused are witch doctors. And that when he responded to the call of the drums on 08.08.10 at 7.30am he found many people gathered at PW2's home; including the accused. The people became harsh and beat up A1 and A2 and A3. And that A1 and A2 confessed that they were the ones who had the victim and he was at A3's shrine.

10

People rushed to A3's shrine but before they got back A1's son brought the victim back; smeared with white stuff over his head and face.

15 This witness stated that, the accused were suspected because they were traditional doctors. And that many people heard their confession of having the victim.

20 PW4 the victim said it was A1 who kidnapped him as he was going back to his father's home at 8.00pm. He grabbed him, held him by the mouth, blind folded and gagged him and took him to A3's shrine where he unfolded him and smeared him with a substance. That thought it was dark, he recognized him with the help of a match light.

25 The next morning that he saw A2 and A3 seated outside the shrine and they opened the door. Later that morning, that he was picked from the shrine by A1's son Benefansio who took him through the bush back to his grandfather's home. By then all 3 accused had left

30 PW5 received the victim at Ikumbya police post. The disappearance of the victim was reported by PW2 and the chairperson of the area. Her

colleagues went out to investigate and about an hour later, A1 and A2 were brought in. Between 15-20 minutes later, the O/C Wagawaga police post brought in the victim; all smeared with herbs over his head and hands. That the victim told her that A1 had taken him and hidded
5 him but he could not tell her where he had been taken. A3 was also brought in that day. The accused were taken away as they had been beaten.

In their defence, all the 3 accused persons denied ever being the
10 perpetrators of the crime. A1 admitted that the victim was his nephew and used to play at his home together with other children. However that on 07.08.10 he left his home at 10.00am to check on A2 his brother who had been involved in a motorcycle accident. When he got home at about 6.30pm he did not find any children playing at his home although
15 his own children were there. He answered the call of the drums and went to PW2's home. He participated in the all night search and returned to his home in the morning.

When he returned to PW2's home at 7.30am, he was asked where the
20 victim was since he had last been seen playing at his home. He was assaulted, required to sit down since as a witch doctor he was suspected to have the child. The assault continued until PW2 came and called one Eclovis Badiiti, the two went away briefly and returned with the victim from behind PW2's home.

25 A1 insisted that the victim was told what to say. And though he has a son Benefansio, at that time he was 7 years of age. A3 has a shrine at his home near Wandango Primary School about 2kms away.

A2 Tenywa Edward, left home on 07.08.10 to go to Japan's home. On the way, they were knocked down and Japan was seriously injured. The chairperson was informed of the accident and Japan was taken to Hospital. A2 returned home about 7.00pm. He was asked by PW2 of the whereabouts of the victim at about 7.30pm but he had not seen him that day. PW2 and 2 women went to the Trading Centre upon their return, he went with them to PW2's home and participated in the search.

10 The next day he was arrested because as a witchdoctor, he too was suspected to be involved in the disappearance of the victim.

He was also assaulted and confirms that when PW2 beckoned Badiiti to go with him, they returned with the victim.

15 A2 denied ever going to A3's home at all or admitting that the child was with A1.

A3 stated that he too answered the drums on 07.08.10 at about 10.00pm. He found many people at PW2's home and he was told of the disappearance of the victim. He too participated in the all night search.

20 On the morning of 08.08.10 when they got out of the bush, he found A1 and A2 had been arrested and were being assaulted. There was also someone among the people inciting the crowd saying the child had been scarified and that all witch doctors deserved to die and their homes razed to the ground.

A3 was arrested because he has a shrine at his home and made to sit down with A1 and A2. He denied that the victim ever saw him with A1

and A2 at the shrine since at the time they were all away searching for him. And that the shrine has no door.

On that day A3 was never taken to police. He went to his daughter's
5 home at Ivuula, Ikumblya. On 12.08.10 when he reported to Nakabugu
police station, he was detained to assist with the investigations. He had
gone to his daughter's home to get away from the people who were
being incited to lynch all witch doctors. He first saw the victim at PW2's
home on 08.08.10 when he was carried away on a bicycle to the sub-
10 county.

Court is mindful of the requirement to evaluate both the evidence of the
prosecution and of the defence and given reasons why one and not the
other version was accepted.

15

Apart from the victim, none of the other prosecution witnesses ever saw
the accused persons kidnap the victim. The victim claims to have
identified the accused persons. A1 when he untied him, smeared him
with substances and lit a match that according to the victim then went
20 out.

The offence is said to have taken place at night - 8.00pm. Victim was
blind folded and gagged and taken away to A3's shrine.

25 The circumstances as described by the victim call for critical
examination to ensure that the victim was honest and accurate in order
to rule out the possibility of mistaken identity - **Roria vs. Republic**
[1967] EA 583.

The circumstances under which A1 is said to have kidnapped the victim had elements of surprise combined with fear and the darkness of the night. According to Case Law ***“The court must warn itself of the danger of conviction on the identification evidence where a witness only sees the perpetrators fleetingly and under stressful circumstances”*** - **Kalume vs. Republic [1968] LLR 693 (CAK).**

In the present case this is coupled with the fact that the victim was a child of tender years, whose evidence as already mentioned required corroboration.

What was required in such circumstances is some other evidence connecting the accused persons to the offence that goes to show that the witness was not mistaken. This is because the identification of an assailant at night is usually more difficult than it would be in broad day light. - **Tomasi Omukono vs. Uganda Criminal Appeal 04/97, Roria vs. Republic [1969] EA 583** and **Uganda vs. R.O. 973 Lt. Samuel Kasujja & 2 Others Criminal Case No. 08/92.**

Though A1 was known to the victim in the present case and it has been held that recognition of an assailant is more satisfactory, more reassuring and more reliable than identification of a stranger because it depends on personal knowledge of the assailant - **Kalume vs. Republic (supra)** and **Anjononi & Others vs. Republic.** In the present case, there was no sufficient light and there is no indication that the assailant ever spoke to the victim.

Although the victim says he saw all 3 accused the next morning seated outside the shrine and they opened the door of the shrine, this is belied

by the evidence of PW3 who stated that by the time he got to PW2's home at 7.30am all the accused were there as they had responded to the drums.

- 5 It is also the uncontradicted evidence of the accused that they all participated in the overnight search for the victim.

It was also the evidence of PW3 that when A1 and A2 admitted having the victim, people rushed to the shrine but before they returned the
10 victim was returned by the son of A1. Without the said son ever having been called to testify, court is left to wonder where exactly the victim was found.

PW2 also stated that when the victim was returned to his home, he was
15 asked where he had been but he could not understand - where upon they took him to Ikumbya police post. PW5 the woman Police Officer says the victim told her he had been kidnapped by A1 but could not tell her where he had been taken.

20 The time when the victim is alleged to have been returned to PW2's home also varies greatly from witness to witness. Between 10.00 - 1.00pm.

The prosecution did not explain why Benefansio was never called as a witness or why no statement was ever taken from him, although
25 according to PW3 and PW3, there were Policemen at the scene when he brought the victim back.

The victim according to PW5 was brought to Ikumbya police post by O/C Wagawaga, contrary to PW2 who says he was taken by police from the
30 Ikumbya police post who had gone with him to investigate.

PW3 claims all the 3 accused were arrested and taken to Ikumbya police post. Yet PW5 received only 2 and does not know when A3 was arrested. This lends credence to A3 who says he reported himself to
5 police and was arrested on 12.08.10 to help with investigations.

With all the discrepancies in the prosecution case not explained a lot of doubt remains in their evidence.

10 As already pointed out, what was required in this case was corroboration of the victims case in material particulars implicating the accused persons, that would give credence to and strengthen the story of the victim, placing it well beyond per adventure. **Mandereya's case (supra)** and **Uganda vs. Sulaiman Karoli HC. Criminal Case**
15 **56/2002.**

The prosecution says in this case that A1 and A2 confessed to having kidnapped the victim. But at the same time they also admitted that the accused persons were assaulted before they made the alleged
20 confession. And there is no evidence that the victim was found in A3's shrine and he re-appeared before the people who went to check the shrine returned.

The accused denied making the confession. And even if court had found
25 that they confessed, such confession would be inadmissible because it was made after the accused were assaulted.

Court finds in those circumstances, that ***"There was no evidence whatsoever to corroborate the evidence of the victim regarding the participation of the accused in the offence. Evidence of***
30

corroboration means independent evidence which affects the accused by connecting or tending to connect him with the crime, confirming in some material particulars not only the evidence that the crime has been committed, but also that the accused committed it” - Uganda vs. Sulaiman Karoli (supra)
5 where the case of **Kibaale Ishma vs. Uganda Criminal Appeal 21/98** was relied upon.

10 The prosecution admitted that the accused persons were suspected to have kidnapped the victim because they were known witchdoctors. The accused admitted that they are witch doctors but this alone without other independent evidence connecting them to the commission of the offence is not sufficient to conclude that they were the perpetrators.

15 Their evidence that this was a period when the residents were denouncing all witch doctors and calling for the destruction of their homes was not controverted by the prosecution. Nor was the evidence of A3 that he left to go to his daughter’s home because of those circumstances.

20

It is trite law that a conviction depends upon the strength of the prosecution case and not upon the weakness of the defence. For all the reasons set out herein, I find that the prosecution failed to prove that the accused persons were the perpetrators of the offence complained of
25 herein.

The Assessors had advised for the acquittal of A3 and the conviction of A1 and A2. But without any material evidence connecting all the accused to the crime, I find that all the 3 accused persons are not guilty
30 as charged.

They are accordingly acquitted of the offence and should be set free forthwith unless otherwise held on other legal charges.

5

Flavia Senoga Anglin

JUDGE

10.10.13

10

10.10.13:

All 3 accused present

Katami Lydia for the state present

15 Ngobi Balidawa holding brief for Muzuusa Stephen for the accused present.

Both Assessors present

Counsel for state: Case is for Judgment.

20 Court: Judgment delivered in open court.

Accused acquitted and set free forthwith unless otherwise held on other charges.

Flavia Senoga Anglin

25 **JUDGE**

10.10.13